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Case Number: 04-928

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2004 TERM

STATE OF OREGON,

PETITIONER,

VS.

RANDY LEE GUZEK,

RESPONDENT.

SUPPLEMENTAL APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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(1973) (Supreme Court has been "particularly suspicious of state trial roles which provide non-reciprocal benefits to the State when the lack of reciprocity interfers with the defendant's ability to secure a fair trial.") This denial of due process was axacerbated by failing to give Appellant's alternative instructions concerning consecutive sentences, which were requested in an attempt to mitigate that harm

For the foregoing reasons, Appellant's sentences of death should be vacated.

ASSIGNMENT OF ERROR NO. 16

The trial court erred in denying Appellant's motion to exclude testimony by transcript, in denying Appellant's motion to strike the transcript testimony of Mark Wilson and Donald Ross Cathey, and in allowing such testimony to be read by surrogates to the jury.

ASSIGNMENT OF ERROR NO. 17

The trial court erred in allowing evidence of the plea agreements of Mark Wilson and Donald Ross Cathey before the jury.

ASSIGNMENT OF ERROR NO. 18

The trial court erred in excluding testimony and evidence impeaching the transcript testimony of Mark Wilson and Donald Ross Cathey.

ASSIGNMENT OF ERROR NO. 19

The trial court erred in excluding any defense evidence of alibi or other evidence tending to negate guilt, in answer to and in impeachment of the transcript testimony of Mark Wilson and Donald Ross Cathey

Pertinent Portions of Record

Appellant incorporates, for purposes of these assignments of error the relevant portions of the record in support of his Assignments of Error Nos. 10, 11, 13, 14, and 15. Appellant further relies upon the following pertinent portions of record.

On May 20, 1997, Appellant filed a *Motion to Exclude Testimony by Transcript*, together with a supporting legal memorandum, seeking to exclude the testimony by transcript of co-defendants Mark Wilson and Donald Ross Cathey, asserting a lack of statutory authority for such testimony, that such testimony would deny Appellant his federal and state confrontation rights, and that such procedure would violate the Due Process Clause. [Case Register: Event No. 590; App. I:1-14]. This motion was denied by order dated September 11, 1997. [App. I:33].

On October 9, 1997, Appellant moved the court for an order striking the previous testimony of Donald Ross Cathey and Mark Wilson, together with a memorandum in support and copies of the plea agreements of Wilson and Cathey. [App. I:15-32]. The motion was denied by an order dated October 9, 1997. [Case Register: Event Nos. 738; 749; App I:33].

At trial, Appellant offered, as offers of proof, denied by the court, the following statements in evidence for purposes of impeaching the surrogate transcript prior testimony of Mark Wilson and Donald Ross Cathey:

> A. **Affidavit of Deborah L. Tuthill**, recounting an interview of co-defendant Cathey by her at Oregon State Penitentiary on June 19, 1991. Ms. Tuthill averred that during that interview, Mr. Cathey told her that he does not know specifically who planned the Leora Waite burglary; that it may have been his idea originally, but that he genuinely did not recall. Ms. Tuthill further averred that Mr. Cathey was sure that he had no intention of killing Ms. Waite; rather his intention was to knock her out. Mr. Cathey also said, according to Ms. Tuthill's affidavit, that after it was

deemed unrealistic to continue with the Waite burglary, it was mutually agreed that the group (Messrs. Guzek, Wilson and Cathey) would go to Houser house. Mr. Cathey reportedly told Ms. Tuthill that there was no ring leader or any one person in charge; rather the activity was mutual. Ms. Tuthill's affidavit further recited that Mr. Cathey told her that there had been no plan or prearrangement to kill the Housers and that their intention was to rob the house. Mr. Cathey reportedly told Ms. Tuthill that Randy Guzek at no time told Mark Wilson to "Do it!", but rather the shooting "just started." Mr. Cathey added, according to Ms. Tuthill, that from his vantage point, he could see Mrs. Houser at the top of the stairway seconds before the shooting began. " [Case Register, Event Nos. 838, 839].

B. **Memorandum of Defense Investigator David Rogers**, dated August 20, 1997, recounting several conversations he had with Mark Wilson at the Oregon State Penitentiary. According to Mr. Rogers' memorandum, Mr. Wilson told him the following: Wilson and the Appellant began committing burglaries while they were still in high school. They began using methamphetamine, and that usage escalated. Wilson was a good student who began dozing off in class due to methamphetamine use. Wilson had been a cadet at the police department. He eventually experienced a deterioration of his body. Wilson and Appellant's first burglary was of a residence in which they had previously attended a party. While there, they observed coins. They returned later and stole the coins. Joel Guzek, Appellant' father, assisted them with that burglary. Mark and Randy committed many burglaries. Neither of them was the leader, there was no leader. Proceeds of the burglaries went to Appellant's father. Appellant and Wilson began carrying guns, but Wilson did not know why they did so. Regarding the Housers, there was not any plan to kill them, and Wilson cannot recall if Appellant really said "Do it!" regarding the shooting of Rod Houser at his front door. [*Id.*]

C. **Deposition of Mark James Wilson.** On April 16, 1993, in the Marion County Circuit Court Case Mark James Wilson, Petitioner v. Manfred Maass, Superintendent, Oregon State Penitentiary, Defendant; No. 91-C10468. In the deposition, Wilson made numerous comments concerning the Houser homicides. Among the statements, were assertions that Wilson did not recall shooting anybody twenty times. He remembered pulling the trigger once outside the house and once inside the house. He did not remember what his state of mind was at the time of the homicides. He was really bothered because he lacked any idea of what was going through his mind at the time of the homicides. He did not specifically know that the gun (used to shoot Rod Houser) was loaded. He had a gun every time they (presumably meaning Wilson and Appellant) committed burglaries. Wilson did not think he ever thought about using the guns during the burglaries. He does not know what his frame of mind was as far as the murder [sic] committed that night. He believed he was

mislead by his trial attorneys, and that if he had known the Parole Board would deny him parole forever, rather than his being definitely released at age 58, he may not have entered into the plea bargain and instead have gone to trial or accepted a death sentence. [Deposition of Wilson, at 8-10, 40-42; Case Register: Event Nos. 838, 839].

D. **The live testimony of Rachel Prudence Elaine Carlson.** Ms. Carlson was an inmate at the Oregon Women's Correctional Center (OWCC). While there, she met Mark Wilson. Ms. Carlson was a legal assistant at OWCC at the same time Wilson was a legal assistant at Oregon State Penitentiary (OSP) which is located directly behind OWCC. They met through daily phone calls and letters. Ms. Carlson did not know Wilson prior to her incarceration.

Eventually, Carlson and Wilson's legal/business relationship evolved into a "social" relationship. They began writing as "pen pals," writing back and forth to each other on a personal level. The telephone calls became more "friendly."

Shortly after Memorial Day, 1997, during one of their telephone calls, Ms. Carlson discussed with Wilson what she had heard about the instant cause, whereupon Wilson characterized her statements as "vicious rumors." Wilson then wrote her a letter about the crimes.

In their first phone call discussing the crime, Wilson became very angry, swearing a lot. He was unhappy with Carlson for listening to anyone about the case. Wilson's follow-up letter was more detailed as far as information about the crime.

Wilson said it was a "burglary that had gone bad." Wilson wrote to Carlson that he had not killed two people, but only one; he gave a brief history of his methamphetamine use starting in January, 1987, through February when he got suspended from school for "doing lines" in the back of his English class, through April when he said he "packed some kind of gun." He further related that graduation was on June 5, and on June 28, he and Appellant had spent the weekend getting high and "using crank," had gotten bored, and decided to do a burglary. He went onto state that he had killed a man during the burglary. Wilson wrote that the people ended up being home, the burglars panicked and two people were killed. Prison officials were disturbed by the letter to Ms. Carlson and interviewed her about it. The letter itself was offered as Defense Exhibit No. 347.

(10/27/97, Tr. 60-67).

E. **Testimony of Lynn Fredrickson**, Lead Detective investigating the Houser homicides. The Fredrickson offer of proof concerned defense

exhibit 348, a report by Fredrickson prepared November 6, 1987, with an appended school record.

(10/27/97, Tr. 81-82).

F. **Testimony of Defense Investigator David Rogers.** Mr. Rogers had reviewed defense exhibit number 347, ante, specifically a reference in that letter from Wilson to Carlson, regarding a meeting between Wilson and prior defense counsel for Appellant. Rogers testified that he was present at the meeting, in which Wilson indicated that he was inclined to testify on behalf of Appellant.

(10/27/97; Tr. 82-84).

G. **A representation by Appellant's trial counsel** that in a conversation with Wilson's lawyer concerning whether or not Wilson would testify in this trial, that Wilson's counsel advised Appellant's counsel that Wilson did want to assist in any he could, but was going to rely on the advice of his attorney. Secondly, that any conversation between Prosecutor Marquis and Wilson's counsel, discussions were had causing Wilson's counsel to conclude that Prosecutor Marquis was saying that if Wilson testified, and did so differently that he did in the first trial of this cause, that would be grounds to vitiate the (life saving to Mr. Wilson) plea agreement.

(10/27/97; Tr. 84-85).

H. **Testimony of Stephanie Dawn Wilson**, wife of Mark Wilson for four years. Mrs. Wilson met Mark Wilson twice before the crimes were committed, in the company of Appellant. She started correspondence with Wilson in January, 1993. Wilson had discussed the circumstances surrounding his aggravated murder conviction with her several times. Wilson told her that he, Appellant and Cathey had been out committing burglaries and, at one point, ended up at the Housers, where they had gone to commit a burglary, expecting no one to be home, but resulting in the murders. He never told her of any intent among the three of them to kill anyone when they went to the Houser resident. Wilson told his wife that the three of them did not discuss killing the Housers specifically, or any one else specifically. He had been consistent in this story. Wilson also told his wife that he had declined to testify in Appellant's current proceeding, invoking his Fifth Amendment privilege under the advise of his attorney, "because he was not certain that they would not revoke his plea agreement and seek the death penalty against him in a future proceeding."

(10/27/97; Tr. 99-101).

On August 20, 1997, Appellant filed a *Notice of Intent to Rely on Evidence of Alibi as Mitigating Evidence* (Case Register: Event No. 645). The notice recited specific evidence Appellant wished to offer, which Appellant asks this Court to consider as constituting an offer of proof:

> I. **The prior court testimony of Clarence Guzek** (Appellant's grandfather), since deceased, offered to prove that on June 28, 1987, from approximately 9:00 p.m. until June 29, 1987, at approximately 2:00 a.m. Appellant was in the presence of and at the home of Clarence Guzek on Walnut Street in Redmond, Oregon.
>
> J. **The testimony of Kathleen Guzek** (Appellant's mother), offer to prove that on June 29, 1987, she noted that at 2:16 a.m. Appellant asked her to set the alarm clock as he had to get up early for work the next day. The location of this conversation was at Kathleen Guzek's residence on Walnut Street, in Redmond, Oregon. She further would testify that when the alarm awoke her at 4:20 a.m. on June 29, 1987, she woke the Appellant, who was sleeping on a loveseat on the deck of her house.

In support of the foregoing offers of proof, in addition to other grounds, Appellant relied upon his *Memorandum in Support of Admissibility of Mitigating Evidence*, referenced numerous times in the Case Register and recited *passim; See*, for example, 10/27/97 Tr. 104)(App. H:9-14; Case Register: Event Nos. 833, 892, 873, 884).[39]

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39 MR. McCABE: Just so the record is clear, I would assert the same grounds in my memorandum. I'm assuming the court is considering the grounds that I've raised –

THE COURT: You bet. I've got it right in front of me in three copies

MR. McCABE: And it's probably not necessary to put another copy into the record, I would assume?

THE COURT: I wouldn't think so. I think the record, I'm not an appellate court, I don't know what they'll think of this record, but I think, at least for my purposes, its sufficient

MR. McCABE: Okay, so I have, and I do rely on all those cases cited in my memorandum in support of admissibility of mitigating evidence

THE COURT: So noted • • •

THE COURT: Okay, that concludes this offer of proof

The state introduced the plea petitions of Wilson and Cathey as evidence for the jury's consideration. (10/27/97, Tr. 13; State's Exhibits 140, 169, 10/8/97 Tr. 16; App I:21-32). Page 4, subsection (5) of Wilson's plea agreement stated: "In addition, I will be subponaed to testify at any trial of both persons mentioned above, Mr. Guzek being one of them." Subsection (6) stated "If I do not testify truthfully in any trial referred to in (5) above, the State of Oregon and Judge Edmonds will no longer be bound by their previous promises made." (*Id.*; 10/27/97 Tr. 28).

The trial court found that Wilson and Cathey were unavailable to testify, and allowed their testimony to be presented through surrogates, denying Appellant's motion to exclude such testimony by transcript, and to strike same. (10/7/97 Tr. 29).

The trial court ruled inadmissible all of Appellant's offers of proof recited above. (10/27/97, Tr. 14, 78, 79, 80, 82, 85, 103).

The bulk of co-defendants' testimony was summarized in Appellant's brief filed in October, 1989, in his original direct review proceeding. It was also summarized in Assignment of Error No. 10 of his opening brief in *Guzek II*. The version of the homicidal events offered by Wilson and Cathey may be briefly summarized as follows:

> Mark Wilson met Appellant at Redmond High School in November, 1986, and they became good friends. Wilson was a frequent house guest at the Guzek residence on Jackson Street in Redmond and kept a toothbrush and razor there. Appellant and Wilson both worked at Pozzi Windows and frequently rode together. Defendant and Wilson met Donald Ross Cathey on June 5, 1987, through another friend, Willie Stevens. Cathey came to the area from California to visit Stevens around the first part of June, 1987. Appellant, Wilson and Cathey were acquaintances and sometimes did things together.

Wilson related that Appellant's father, Joel Guzek, and his girlfriend, Jill Armstrong, had a plan to steal jewelry from an elderly lady by the name of Mrs. Whaite as one of the last illegal things they did before leaving town. Joel estimated that Mrs. Whaite had approximately $10,000 worth of diamond rings. Wilson got Mrs. Waite address by impersonating an Eagle Crest timeshare salesman and asking to send her some literature. Appellant and Wilson drove to the area and attempted to find the house. Wilson consulted an encyclopedia and called several chemical companies to find out about chemicals that would knock a person out.

Appellant, Wilson and Cathey spent June 28, 1987, together swimming and riding Wilson's quadrunner at "The Cove" and Climb Falls. Robin Martin saw the three at Climb Falls and estimated that they left between five and six p.m. Appellant left before Wilson and Cathey did to go see a girlfriend. Wilson and Cathey drove to Crooked River Ranch, then drove down Lower Bridge Road following two attractive young ladies in a Mini Blazer with jet skis. On the way, Cathey saw a house on a hill and said "this looks like a nice house to hit", meaning burglarize. Wilson explained that it was Anne Houser's aunt and uncle's house. Wilson dropped Cathey off in Redmond and returned to his home in Crooked River Ranch.

Wilson returned to Appellant's resident on Jackson Street later that same evening. Appellant decided to get Mrs. Waite's rings for his father. Appellant discussed the plan to burglarize the Waite residence with Cathey and Cathey was "all for it." Wilson and Cathey drove to Crooked River Ranch to steal a headlight switch for Wilson's truck, but a security patrol passed by and Wilson instead went home and borrowed his mother's truck. Donna Wilson saw her son Mark and Cathey as they returned the quad runner and left in her truck about 11:45 p.m. Wilson and Cathey returned to Appellant's residence in Redmond.

After heading out, the three stopped at the Safeway parking lot in Redmond and each snorted one line of crank. They then proceeded toward Bend to carry out the Whaite plan. Cathey and Wilson were to go up to the door and say they were having car trouble and Cathey was to stab Mrs. Whaite with a pocket knife Appellant had given him. Appellant was to act as look out and to help remove valuables after everything was clear. The entire plan was scrapped because there were too many lights on and too many cars in the Whaite's driveway that night. Cathey also said he backed out when they got to the house.

Mark Wilson described the next sequence of events as follows:

"Q [Prosecutor]: Then where did you go after you went past her residence?

A [Wilson]: Well, we headed back up the hill because she lived down next to the river, so we headed up the hill again and headed towards Redmond.

* * * * *

Q: Was there any discussion as to what you were then going to do?

A: At that time we all decided basically that we were, we would like to hit a house, burglarize a house. And we were trying to figure some place to burglarize.

Q: Did you eventually decide on a place to burglarize?

A: Yes, we did. That would have been the Houser residence.

Q: How did you arrive at the decision to, to go to the Houser residence?

A: I believe Ross Cathey brought up the fact as 'what about that house we saw today, Anne Houser's aunt and uncle's ' and, we all thought that would be okay with us to go. I guess that's what we decided on."

The trio returned to the Guzek residence on Jackson Street and Appellant procured a .22 rifle and .32 pistol from the house. They headed for the Houser residence and along the way Appellant stopped to show Wilson how to un-jam the rifle and fired several shots. Appellant and Wilson told Cathey that if anyone was home at the Houser residence they would go in and "get them down." All three went up to door upon arrival. Appellant knocked several times. Rod Houser answered the door in his robe and asked what they wanted. Appellant made up a story about prank phone calls from Anne Houser and Rod started getting irate. At that point, Appellant turned to Wilson and yelled "do it" and Wilson immediately raised the rifle and started firing. Wilson continued to fire at Rod Houser as Rod backed into his house and eventually fell down in front of the front room fireplace. Wilson did not recall how many shots were fired or even that he emptied the clip, but he appeared to fire until the rifle ran out of bullets.

As Wilson was shooting Rod Houser, Appellant ran up the stairs after Lois Houser and three shots were heard by Wilson and Cathey to come from upstairs. Cathey told Wilson "let's make it look like a cult killing." Cathey stabbed Rod Houser in the throat with a pocket knife Appellant had given him earlier that night. Cathey also put a white Bible on top of Rod Houser's body. Wilson and Cathey observed Appellant rummaging through property upstairs and were told by Appellant that he found a .357 magnum in a closet and that he assumed Lois was going for it when he

"hit" her there. Appellant also said he placed a knife in Lois Houser's outstretched hand.

Appellant told Cathey and Wilson to listen for cars and to check downstairs for items of value to take. All three removed property from the residence and stacked it in Donna Wilson's pickup. All three wore gloves. The pickup was 1/2 to 3/4 full with Houser property. The trio left but returned shortly thereafter to retrieve empty shell casings left in the residence. They drove to Ferguson's Market in Terrebonne where Appellant called his father to come and meet them. Joel Guzek and Jill Armstrong arrived a short time later and most of the Houser property was loaded into their Volkswagen Jetta. Appellant told his father the property came from a drug deal gone bad and Wilson and Cathey went along with the story.

Wilson and Cathey each received some money from Appellant, but neither got any of the Houser property. Appellant told Wilson at work later that he (Appellant) had shot Lois Houser in three vital areas. Appellant and Wilson accompanied Joel Guzek and Jill Armstrong to Reno for the fourth of July weekend. Along the way Joel asked Appellant if they thought it was really worth it. Appellant got a big grin on his face and said "yes it was."

At one point after their arrests, Appellant and Cathey were housed in adjacent cells in Deschutes County Jail. Appellant passed a note to Cathey through a hold in the cell wall requesting Cathey to write a note saying that Appellant had nothing to do with the homicides. Cathey and Wilson both reached life-saving plea agreements with the prosecutor and agreed to testify against Appellant. Wilson and Cathey both testified that Appellant killed Lois Houser.

(10/8/97 Tr. 18-85; 10/14/97 Tr. 196-259; 10/15/97 Tr. 30-141).

Relevant Statutory and Constitutional Provisions

Former ORS 163.150(5)(d), now codifiefd as ORS 138.012(b), states, in relevant part:

". . . A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceedings are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence."

OEC 802 provides:

"Hearsay is not admissible except as provided by Rules 801-806 (ORS 40.450 to ORS 40.475) or as provided by law."

OEC 803(a) provides:

"(3) **Hearsay exceptions.** The following are not excluded by Rule 802 (ORS 40.455) if the declarant is unavailable as a witness:

> (a) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination."

OEC 804(1) [ORS 40.465(1)] defines "Unavailability as a witness" to include situations in which the declarant:

"(a) Is exempted by ruling of the court on the ground of privilege from tesitfying concerning the subject matter of the statement;

(b) Persists in refusing to testify concerning the subject matter of a statement despite an order of the court to do so;

(c) Testifies to lack of memory of the subject matter of the statements;

(d) Is unable to be present or to testify at the hearing because of death or then existing mental illness or infirmity; or

(e) Is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of an exception under paragraph (b)(c) or (d) of subsection (3) of this section, the declarant's attendance or testimony) by process or other reasonable means."

OEC 806 provides:

"**Attaching and Supporting Credibility of Declarant**. When a hearsay statement, or a statement defined in ORS 40.450(4)(b)(C), (D) or (E) [Rule 801(4)(b)(C), (D), or (E)], has been admitted into evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the hearsay statement of the declarant, is not subject to any requirement under ORS 40.380 [Rule 613] relating to impeachment by evidence of inconsistent statements. If

the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination."

The Legislative Conference Commentary to Rule 806, states in relative part:

"Oregon Rule of Evidence 806 prescribes the manner and limits of impeaching, rehabilitating and cross-examining a hearsay declarant. The rule is based on Rule 806 of the Federal Rules of Evidence. Its reference to ORE 613 replaces a federal reference to the opportunity to deny or explain, and was made necessary by the specific retention of Oregon practice on inconsistent statements in that rule.

Impeachment of absent hearsay declarant. The declarant of a hearsay statement that is admitted into evidence is in effect a witness. Therefore, in fairness, the declarant's credibility should be subject to impeachment (and to rehabilitation) as if the declarant had in fact testified. See Rules 608 to 609-1. There are problems in doing this, however. These arise from the factual differences between hearsay and live witnesses, and between kinds of hearsay, and principly involve the foundational requirement for impeachment by inconsistent statement.

An inconsistent statement of a live witness is inevitably a prior statement, which may be called to the witness' attention in accordance with ORE 613 a statement that is inconsistent with hearsay may be subsequent to it, and cannot be called to the declarant's attention. If the court insists on the usual rules for impeachment by inconsistent statements in a hearsay situation, it must deny the opponent, who is already barred from cross-examination, any benefit of this important technique. The writers favor allowing the inconsistent statement. McCormick, Evidence section 37 at 74 (2nd Ed. 1972); 3 Wigmore, Evidence section 1033 (3d Ed. 1940). The cases, however, are divided. Compare People v. Collup, 27 Cal.2d 829, 167 P2d 714 (1946); People v. Rosoto, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P2d 867 (1962); Carver v. United States, 164 US 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897) (allowing impeachment), with Mattox v. United States, 156 US 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); People v. Heinz, 284 NY 93, 29 NE 2d 483 (1940) (disallowing impeachment).

When the inconsistent statement was made after the hearsay statement, the kind of hearsay involved seems unimportant. The opponent may not have been totally deprived of cross-examination when the hearsay is former testimony, ORE 804(3)(a), but the opponent still was deprived of cross-examination along lines suggested by the trial.

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> For these reasons, the Legislative Assembly dispensed with the foundation requirement in all hearsay situations, leaving a rule which is readily administered and fair.
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> • • •
>
> The above matters had not been addressed in Oregon statute or case law. Federal Ninth Circuit law is in accord, however. McConney v. United States, 421 F.2d 248, 251 (9th Cir. 1969); See also: Carver v. United States, *supra*."
>
> Article I, Section 11 of the Oregon Constitution provides in relevant part:
>
> "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses face to face . . . '"

The Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . "

ARGUMENT

Standard of Review

This Court reviews the trial court's admission or exclusion of evidence for errors of law. *State v. Pinnell*, 311 Or 98, 109 n. 17 (1991). This Court reviews constitutional issues for errors of law.

Discussion

Because of the close interrelation of the questions presented, Appellant combines his arguments on Assignments of Error Nos. 16, 17, 18, and 19. In *Oregon Evidence*, pp. 521-522 (Butterworth Legal Publishers Second Edition), Laird C. Kirkpatrick discusses the relationship between hearsay and the Confrontation Clause:

> "The hearsay rule and the Confrontation Clause are not co-extensive. Evidence may be admissible under the confrontation clause, yet be inadmissible under the hearsay rule. Conversly, evidence may be admissible as an exception to the hearsay rule under state evidence law, yet be inadmissible under a confrontation clause. *See, Pointer v. Texas,*

380 US 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). . . . If the hearsay declarant does not testify at trial and the out-of-court statement is admitted as an hearsay exception, whether or not the Confrontation Clause depends on whether there is a satisfactory basis for the trier of fact to evaluate the truth of the prior statement and whether the statement possesses sufficient 'indicia of reliability.' *Dutton v. Evans*, 400 US 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).

As the Supreme Court stated in *Ohio v. Roberts*, 448 US 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980):

> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection." . . . This reflects the truism that 'hearsay rules and the Confrontation Clause are generally designed to protect similar values," *California v. Green*, 399 US at 155,' stem from the same roots. *Dutton v. Evans*, 400 US 74, 86 (1970). It also responds to the need for certainty in the work a day world of conducting criminal trials.
>
> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then though, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.'

As the quoted statement indicates, if the declarant is shown to be unavailable and the statement satisfies a 'firmly rooted' exception to the hearsay rule, compliance with the Confrontation Clause is almost certain to be found. If no showing is made of the unavailability of declarant . . . or if the hearsay exception is not 'firmly rooted' there is greater uncertainty regarding whether the Confrontation Clause is satisfied."

On Page 523, Kirkpatrick compares the state and federal confrontation provisions and states that:

> "To date the Oregon Supreme Court has tended to adopt the precedents of the United States Supreme Court 'in determining what constitutes unavailability of a hearsay declarant and what constitutes adequate indicia

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> of reliability of hearsay declarations to satisfy our state constitutional confrontation clause.' *State v. Campbell*, 299 Or 633, 648, 705 P2d 694, 703 (1985)."

The United States Supreme Court has recently ruled that statements of co-defendants, against their own penal interest, which inculpate the defendant on trial, may not be admitted against the defendant on trial if that defendant has no opportunity to cross-examine; doing so would violate the federal Confrontation Clause, because statements against penal interest are not "firmly rooted" and are inherently suspect. *Lilly v. Virginia*, 527 US 116, 119 S.Ct. 1887, 144 LEd2d 117 (1999). *See also*: *Gray v. Maryland*, 523 US 185, 118 S.Ct. 1151, 140 LEd2d 294 (1998).

Nonetheless, Appellant urges this Court to re-examine the issue, both because Appellant believes that ORS 138.012(2)(b) on its face by permitting the state to substitute surrogate testimony by transcript, is unconstitutional; additionally, Appellant contends that doing so in this case violated his state and federal constitutional rights.

ORS 138.012(2)(b) on its face, permits the state to substitute the surrogate testimony by transcript of the co-defendants from Appellant's first trial in lieu of live testimony, and the statute facially allowed this to occur in lieu of the state producing the witness in the courtroom to show unavailability, and without requiring the state to show that the Appellant "had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination." Here, both Wilson and Cathey were produced (Wilson by telephone). Cathey was adamant he would not testify under any circumstances. Wilson invoked his Fifth Amendment privilege against self-incrimination, because, as explained by his attorney, he had a federal *habeas corpus* proceeding pending. The trial judge, however, did not explicitly order Wilson and Cathey to testify.

It is Appellant's position that ORS 138.012(2)(b) as it was applied in this trial, is in conflict with the hearsay rules of the Oregon Evidence Code and violates the state and federal provisions concerning the use of former testimony as an exception to the hearsay rule, thereby also violating the state and federal Confrontation Clauses. No former testimony should have been presented in Appellant's trial, notwithstanding the real or purported "unavailability" of the witnesses.

The hearsay exception to the admissibility of former testimony permits the admission of former testimony only in those situations where the parties at the prior proceeding had a "similar motive" to examine the witnesses as they would if the witness was produced life at the current proceeding. ORS 138.012(2)(b), violates the state and federal Confrontation Clauses unless it is rooted in a well-recognized hearsay exception. The state cannot demonstrate that any former testimony fell inside a firmly rooted exception to the hearsay rule, by virtue of *Lilly v. Virginia, supra*. The state, in order to do so, would have to demonstrate that the parties at Appellant's first trial had "similar motives" to examine the witnesses, as they would have at the trial in the present hearing.

ORS 163.150 provides the sentencing scheme in a death penalty case. Appellant was first tried in 1988. The testimony of the witnesses the state offered through a surrogate was transcribed in 1988. At the time of Appellant's 1988 trial, the jurors sitting in the sentencing hearing deciding whether or not death should be imposed on a person convicted of aggravated murder had to resolve only three issues: (1) Did the defendant deliberate; (2) Would the defendant be dangerous in the future; and (3) Was the defendant's conduct in the killing of the deceased unreasonable in response to

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provocation, if any provocation existed. The statute permitted the jury to consider mitigating evidence, but only with regard to the three questions. In fact, the statute itself limited mitigation to only the future dangerousness question. The scheme did not permit a jury to vote against a sentence of death on the basis of mitigating evidence, if the mitigating evidence did not apply to the three questions set out in former ORS 163.150(b), or by the statute's terms to the second question only.

In *State v. Wagner*, 305 Or 115 (1988), ("*Wagner I*") the Oregon Supreme Court held that Oregon's death penalty scheme was constitutional. The defendant in *Wagner I*, like the Appellant in this case, contended that the scheme violated the United States Constitution because the jury was not presented with the issue of mitigation as a basis for a life sentence if the mitigation did not relate to the three death questions. The Oregon Supreme Court held that no fourth question presenting such consideration was permitted under the statute. As a result of the holdings of the Oregon Supreme Court and the judge at Appellant's first trial, there was no issue before the jury that sentenced Appellant the first time concerning mitigating evidence that did not relate to the three death questions.

In 1989, the United States Supreme Court decided *Penry v. Lynaugh*, 492 US 302 (1989). *Penry* concerned a Texas case. In 1988, the death penalty statutes in Texas and Oregon were almost identical. *Penry* held that the Texas trial court erred when it limited the mitigating evidence a jury could hear only to evidence that was relevant to the resolution of the three death questions. The United States Supreme Court held that the Eighth Amendment to the United States Constitution was violated when the jury was prevented from using mitigating evidence when it had to do with the

issues other than those presented in the three death questions, in deciding whether the death penalty should be imposed. As a result of *Penry*, Oregon's death penalty statute was legislatively and judicially amended. A "fourth question" has been added to the statutory scheme. That question asks jurors to decide whether a death sentence should be imposed. The amended statute tells jurors that, in determining that issue, they are to answer the question "no" if, considering any aspect of the defendant's character or background, or any circumstances of the offense, and considering victim impact evidence and any aggravating evidence, that a sentence of less than death would be appropriate.

In *United States v. Powell*, 894 F2d 895 (7th Cir.1990), Defendant Powell argued that the trial court had committed error when it excluded the transcript of the guilty plea hearing testimony of a witness whom the defense wished to call, who invoked the Fifth Amendment privilege against self-incrimination at the defendant's trial. In holding that the trial court had not committed error, the Seventh Circuit explained that the witness was unavailable within the meaning of Rule 804 of the Federal Rules of Evidence. The court then pointed out that in order to have the transcript of the prior testimony admitted under the Federal Rules of Evidence involving the hearsay exception for former testimony, FRE 804(b)(1), which is identical to OEC 804(b)(1), it was necessary to show that the prosecutor had a similar motive to interrogate the witness at the guilty plea hearing as he would have had at the defendant's trial. The Seventh Circuit rejected the defendant's contention that the prosecution had a similar motive, stating:

> ". . . The prosecution's motive at a guilty plea hearing is to assure that the plea is voluntary and that a factual basis exists for it . . . This responsibility, moreover, rests primarily with the trial judge . . . Here, although Heet denied it at his guilty plea hearing that he conspired with

> Powell and Saudy, he admitted to conspiring with others in committing the offenses in Counts One and Two of the Indictment. Thus, the government did have incentive to pursue the issue of Powell's involvement." *Id.*, at 901.

In the case at bar, the Oregon Supreme Court had held in *Wagner I*, *supra*, that Oregon's statute did not contain a fourth question that would present an issue to the jury concerning mitigating circumstances that did not bear on the three death questions in the 1988 statute. It is this very failure of the 1988 statute to contain a "fourth question" that resulted in the reversal of Appellant's death sentence by the Oregon Supreme Court. *Guzek I*, 310 Or 299 (1990). As in *Powell*, Appellant's attorneys would not have had any incentive to introduce mitigating evidence that did not bear on the three death questions when they examined the witnesses in Appellant's first trial. In fact, in 1988, such evidence would have irrelevant to any of the issues before the jury and could have conceivably been subject to a proper objection or mistrial motion.

This Court has explained that " 'Opportunity' in the context of OEC 804(3)(a) refers to the legal or practical hurdles that would impede the examiner if the examiner were motivated to develop it, *e.g.*, witness asserted a privilege to prevent cross-examination or impeaching documents were not available." *State v. Pinnell*, 311 Or 98, 116 n.27 (1991). In Appellant's case, the opinion of this Court in *Pinnell*, would provide a legal barrier to inquiries concerning mitigating evidence that was not relevant to the three statutory death issues in effect at Appellant's first trial. In *Pinnell*, *supra*, 311 Or at 166 n. 28, this Court stated that " 'motive,' in the context of OEC 804(3)(a), refers to those tactical and strategic considerations that might reasonably influence the direction and extent of counsel's development of the testimony." Similarly, Appellant's attorney's

knowledge – that the Oregon Supreme Court, on February 26, 1988 (while Appellant's first trial was underway)40 had held that there was no provision in the Oregon death penalty statute for a jury to decide against imposing a death sentence because of mitigating factors not related to the three statutory questions – would influence the attorney's strategy and tactics. The attorney would not ask questions which he knew related to irrelevant issues because he would expect objections by the prosecution to be sustained and because of ethical duties to avoid attempting to introduce improper evidence into a legal proceeding.

In any event, the death penalty scheme, as it existed in 1988, provided no motive for Appellant to inquire of any of the witnesses (Wilson, Cathey) with regard to any general mitigating circumstances.

Dayton Leroy Rogers was charged in one indictment with the murder of decedent Smith. In another indictment, he was charged with the murder of six other women. Rogers was tried first for the murder of Smith. He was found guilty of aggravated murder, but the jury answered "no" to the question "Is there a probability that the defendant, Dayton Leroy Rogers, would commit criminal acts of violence that would constitute a continuing threat to society?" As a result, Rogers did not receive the death penalty for the murder of Smith.

Prior to his trial for the murder of the six women, Rogers filed a motion to declare him ineligible for the death penalty on the grounds that the jury's verdict of "no" in the Smith murder trial precluded the state from re-litigating the issue of his future

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40 Appellant's verdict of guilty on all nine counts was returned on March 3, 1988 [Case Register Event No. 168]

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dangerousness in the trial for the murders of the six women. This Court rejected Rogers' argument because:

> "The issue presented by the second question in the present case differs from the second-question issue in the Smith case, because the sentencing jury in each case had to determine whether, based on everything in defendant's life to that point in time (including 'the extent of the mental and emotional pressure under which the defendant was acting at the time the killing was commited') defendant likely would be dangerous in the future . . . The trial in the present case took place nearly one year after the Smith homicide trial. Because everything that has occurred in a defendant's life may be relevant to a determination of that defendant's future dangerousness, the second-question determination necessarily incorporates a temporal element. The jury must determine a defendant's future dangerousness from the day on which the jury makes its determination forward, based on the defendant's life from that day backward. The year of defendant's life between the two trials and defendant's subsequent conviction in the guilt phase of this case had not yet occurred at the time the Smith homicide jury rendered its verdict." *State v. Rogers*, 313 Or 356 , 376-77 (1992) (*Rogers II*).

The holding in *Rogers II* affects Appellant's case. Appellant did not have an opportunity or motive to examine the witnesses at his first trial concerning matters that occurred after the first trial, because those events had not yet occurred. Because Appellant was deprived of this opportunity, the former testimony exception to the hearsay rule does not apply and the transcripts were not admissible under OEC 804. Since the hearsay exception did not permit the admission of the surrogate transcript testimony, both the Oregon and federal Confrontation Clauses were violated because the challenged statements would not satisfy a "firmly rooted" exception to the hearsay rule.

In *State v. Herrera*, 268 Or 349 (1979), this Court reversed a murder conviction for violation of a defendant's confrontation rights.

In *Herrera*, the trial court had allowed into evidence before the jury preliminary hearing testimony of a prosecution witness who testified under immunity, then claimed privilege against self-incrimination at trial when the state broke its promise. The state claimed on appeal that the witness was unavailable and that, therefore, the prior testimony could be introduced. The Supreme Court disagreed stating:

> "The confrontation clause, while guaranteeing the defendant the right to confront a witness face-to-face is not without exception. One such exception under which prior recorded testimony which was subject to cross-examination may be introduced into evidence at trial exists when a witness is truly unavailable to testify at trial * * * However, because of the defendant's strong interest in confronting his accusers and the prosecutor's duty to provide a fair trial for the defendant and to protect the defendant's constitutional rights, the prosecutor's invocation of this exception cannot be granted routinely.
>
> "Before a prosecutor can use prior recorded testimony and thus deprive a defendant of his right at trial to confront his accusers face-to-face, he must first show the trial court that the use of the former testimony is a genuine necessity [* * *] The burden is on the prosecutor to show the trial court what circumstances exist which make use of the prior recorded testimony necessary." State v. Herrera, 286 Or at 355.

This Court in *Herrera* stated the vital interests protected by the right of confrontation. The first vital interest was described as:

> "The right of confrontation protects two vital interests of the defendant. First, it guarantees that the defendant has an opportunity to cross-examine the witness against him in order to test his sincerity, memory, ability to perceive and relate, and the factual basis of his statements. This purpose of confrontation helps to assure the accuracy of the result of the jurors' –determining process by giving the accused an opportunity to test the recollection and conscience of a witness. *Barber v. Page*, 390 US 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968)." *Herrera*, at 353.

In Appellant's case, he had the opportunity to cross-examine the witnesses in the guilt phase and the first penalty phase. However, this Court in *Herrera*, held that the right of confrontation protects a second vital interest which, as in the case of Appellant

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Herrera was violated for Appellant Guzek by admission of the surrogate transcript testimony:

> "The second interest of the defendant which the right to confrontation protects is enabling the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant so that the credibility of the witness is displayed in the courtroom. This second purpose is no less important than the first." *Id.*, at 354.
>
> This Court cited with approval its holding in *State v. Smyth*, 286 Or 293 (1979):
>
> "In our system of justice a defendant is not tried on a dossier compiled in prior hearings, no matter how thoroughly and judicially conducted. His guilt must be established at the trial by evidence that convinces a fact-finder beyond a reasonable doubt. But the earlier opportunity to question the witness will often avail little when the jury at the trial sees neither the witness nor the effect of the cross-examination recorded in a cold transcript. As the United States Supreme Court stated in Barber, '[t]he right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weight the demeanor of the witness.' 390 US 725, * * *."

ORS 138.012(2)(b) is facially unconstitutional by providing in relevant part that a "transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding . . . ." The language of that statute is flatly irreconcilable with Article I Section 11, the Sixth and Fourteenth Amendments, *State v. Herrera*, *supra*, and *Barber v. Page*, *supra*.

In *State v. Douglas*, 310 Or 438, 444-45 (1990) the Appellant assigned as error the admission of an "unavailable" witness' testimony, which had previously been recorded in that Appellant's preliminary hearing. This Court disagreed with Douglas' contention that the challenged testimony did not meet the requirements of OEC 804(3)(a) that there had been an "opportunity and similar motive to develop the

testimony" in the preliminary hearing This Court found that the security release hearing did meet those requirements.

In *Douglas*, this Court held that Appellant had the opportunity at the security release hearing to cross-examine the witness, and availed himself of it fully. This Court also found that Douglas had a similar motive to cross-examine the witness at the security witness hearing because the parties and the pending charge were identical in the two proceedings. Like the trial court, this Court noted the security release hearing focuses on the question of defendant's guilt. Because release in a murder case will be denied if "the proof is evident or the presumption strong that the person is guilty" (ORS 135.240(2); Or.Const., Art., I Section 14), this Court "presume[d] that defendant sought the hearing because he wanted to be released. That is, not only was the central issue of guilt essentially the same, but also defendant's motive in having that issue decided in his favor at the security release hearing was similar to his motive at trial." *Douglas*, *supra*, at 455.

In *State v. Moen*, 309 Or 45, 84-86 (1990), this Court held that a preliminary hearing provides an opportunity to cross-examine witnesses and suggest the same motive to do so that is similar to the motive at trial. Because of the opportunity to cross-examine the witness at the preliminary or security release hearings, this Court further held that confrontation rights under the state and federal constitutions are not violated by admitting such testimony during the guilt phase of the proceedings. *State v. Douglas*, *supra*, 309 Or at 445-46; *State v. Moen*, *supra*, 309 Or at 86

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As aforestated, the elements of (1) opportunity to cross-examine and (2) motive to cross-examine witnesses Wilson and Cathey were not the same in Appellant's first trial, and his most recent penalty phase hearing on remand.

As noted in the recitation in the pertinent portions of record for these assignments of error, co-defendants Wilson and Cathey, after they had received their life-saving sentences in exchange for their testimony against Appellant in his first trial, made a number of statements which were inconsistent with their prior testimony. These statements concerned whether Appellant was a "ring leader" who had master-minded the murders of the Housers, and ordered the co-defendants to kill. Allowing the transcript testimony permitted the state to present a one-sided theory to the jury, which supported the contention that Appellant was such a manipulative, ring-leading mastermind. Appellant was unable to cross-examine Wilson and Cathey regarding their subsequent inconsistent statements in that regard.

OEC 806 and its commentary make clear that Appellant should have been permitted to meet those claims, made in the absence of Wilson and Cathey at his remand hearing, by impeaching them. The trial court compounded the violation of Appellant's confrontation rights by not allowing the exhibits and testimony offered by Appellant in that regard.

The trial court's failure to admit the subject exhibits and testimony violated a number of Appellant's rights. The evidence is relevant under OEC 401, and was entitled to be presented to the jury pursuant to ORS 163.150(1)(a) because it was "matter . . . relevant to sentence * * *."

The proferred evidence rebutted the state's assertion that Appellant was the "ring leader" of a homicidal gang. The evidence, therefore, was within that which concerns Appellant's character and background, under *Wagner II*, 309 Or 5.

Appellant made specific offers of proof concerning the evidence he wanted to introduce. Oregon jurisprudence provides that an offer of proof can be a recitation by counsel of what the witness would say, or testimony by the witness. *State v. Phillips*, 314 Or 460, 466, 840 P2d 666 (1992); *State v. Affeld*, 307 Or 125, 128, 764 P2d 220 (1988); *State v. Olmstead*, 310 Or 455, 461 (1990).

The trial court's error precluded Appellant from introducing evidence relevant to the appropriate sentence he should receive, contrary to ORS 163.150(1) and OEC 401.

The trial court's rulings also violated Appellant's rights to be heard and to present a defense under Article I, Section 11 of the Oregon Constitution and the Sixth and Fourteenth Amendments to the United States Constitution, as well as his rights to confront and cross-examine the witnesses against him under those same constitutional provisions, and denied him due process. In Appellant's first trial, co-defendants Wilson and Cathey provided the evidence which convicted him and led to his death sentence, in what would have otherwise have been an entirely circumstantial case. The fact that co-defendant Wilson had recanted his testimony, at least partially, with regard to whether Appellant's involvement in the crime was as a ringleader, was extremely relevant and was certainly a mitigating factor. At the very least, it was a subsequent inconsistent statement which would have been very powerful in the impeachment of Wilson's and Cathey's surrogate testimony by transcript.

Allowing the surrogate testimony by transcript of Wilson, while excluding his subsequent inconsistent statements, was an inconsistent ruling. Wilson's statements were inconsistent with his previous testimony, and Wilson had been ruled unavailable as a witness by the trial court. The result of this one-sided set of evidentiary rulings was that the state was granted a non-reciprocal benefit to present unimpeached material testimony which was critical to the jury's determination as to whether Appellant should die.

This controvened the rule of *Wardius v. Oregon*, *supra*, in violation of the due process clause of the Fourteenth Amendment. Further, because Appellant could not have known in his first trial that Wilson would subsequently change his statements, the due process clause was violated for that reason also.

Appellant was, therefore, also denied a reliable adjudication of an appropriate sentence under the Eighth Amendment because the jury was not allowed to consider this evidence in deciding the punishment. *Jurek v.Texas*, 428 US 262, 271 (1976); *Turner v. Murray*, 476 US 28, 33-34 (1986).

Appellant here had "no opportunity to deny or explain" or even impeach the statements of Wilson and Cathey. He could not "appropriately create any other opportunity to meet what was not in the case," *State v Tucker*, 315 Or 321, 353 [Fadely, J., dissenting, citing *Chambers Mississippi*, v. 410 US 284, 302-03 (1973)], when the court not only disallowed his offers of proof concerning Wilson and Cathey, but additionally denied Appellant the right to present alibi evidence to challenge the co-defendants' transcript testimony.

As the United States Supreme Court stated, in overturning the conviction in Chambers:

> "Few rights are more fundamental than that of an accused to put on a fence . . . where constitutional rights directly affecting the ascertainment of [outcome] are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice . . . exclusion of this critical evidence . . . denied . . . fundamental standards of due process. . . .and . . . deprived Chambers of a fair trial." *Chambers*, 410 US at 302-03.

As noted, ante, the plea agreements of Wilson and Cathey were admitted into evidence. Relevant paragraphs of those plea agreements recited that Wilson and Cathey were required thereunder to testify truthfully against Appellant, under the penalty of having their life-saving plea agreements revoked if they failed to do so. Although Wilson and Cathey refused to testify at Appellant's subsequent penalty hearings, the state has never sought to revoke those plea agreements. Nonetheless, their admission before the jury constituted reversable error.

In *State v. Charboneau*, this Court reversed convictions for aggravated murder and murder, where the only eye witness to the murder testified in detail as to Charboneau's personal participation in the murder, and the trial court allowed the state to introduce into evidence the plea agreement of the eye witness which recited the state's belief that the eye witness' representations accurately stated his involvement in the crime. *State v. Charboneau*, 323 Or at 42-43, 50, 913 P.2d 308 (1996).

In *State v. Wilson*, 323 Or 498, 918 P2d 826 (1996), Charboneau's co-defendant's convictions for aggravated murder and murder, of the same victim, were reversed for precisely the same reason.

In *Charboneau* and *Wilson*, this Court noted that the eyewitness whose plea agreement had been introduced by the state, was the only eyewitness to the murder

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who testified in detail as to the defendants' personal participation therein, thereby providing the crucial evidence that tied the defendants to the murder. Under those circumstances, this Court held the error was prejudicial, requiring reversal of the convictions.

This Court based its ruling on the proposition that a "witness' testimony or exhibit may not, explicitly and directly, contain an opinion as to a trial witness' credibility." *Wilson*, 323 Or at 502; *Charboneau*, 323 Or at 48.

Here, the plea agreements comment on Wilson's and Cathey's credibility was a reference to pre-testimonial polygraphs. Appellant urges that admitting into evidence a recitation that Wilson and Cathey must "testify truthfully" concerning Appellant's guilt, is tantamount to such a direct and explicit comment.

Appellant urges this Court to reach the merits on this issue on the grounds that it constitutes "plain error," which is "apparent on the face of the record." ORAP 5.45(2); see also, *State v. Brailey*, 224 Or 1, 9 (1960).

Accordingly, Appellant's rights under the Confrontation Clauses of the state and federal constitutions, and his right to be heard and to present critical evidence as part of a complete defense under Article I, Section 11 and the Due Process Clause, were violated. Therefore, his sentences of death should be vacated.

ASSIGNMENT OF ERROR NO. 20[41]

The trial court erred by denying Appellant's motion to change venue.

Appellant filed a motion for change of venue in November, 1996. (App. J 1-2). Following a January 27, 1997 evidentiary hearing, Appellant's counsel told the court that